MOHAMAD GHAZALI SHUIB & ORS A

v.

AMALAN TEPAT SDN BHD & ANOR

HIGH COURT MALAYA, MELAKA B
LOW HOP BING J
[ORIGINATING SUMMONS NO: MT1-24-269-2005]
4 OCTOBER 2007

CIVIL PROCEDURE: *Action - Cause of action - Injunction preventing execution of judgment obtained for damages - Locus standi - Whether there was reasonable cause of action - Whether not obviously unsustainable and must be determined on its merits* C

The plaintiffs sought an injunction preventing the purchasers, collectively named as the second defendant, from executing any judgment that it had obtained for liquidated and ascertained damages against the first defendant. The plaintiffs had entered into sale and purchase agreements with the first defendant to purchase their respective A'Famosa Villa De Agua condominium units, of which the developer was the first defendant. The first defendant, however, had failed to hand over vacant possession of the condominium units. The plaintiffs in this action did not intend to extinguish the second defendant's rights but merely to suspend any proceedings against the first defendant, in particular the winding up, so as to ensure delivery of the condominium units to all purchasers, including the second defendant. The second defendant raised a preliminary objection on the ground that the plaintiffs had no reasonable cause of action against the second defendant. The plaintiffs, on the other hand, contended that the relationship between the plaintiffs and the second defendant arose from their purchase of the condominium units, and so the plaintiffs had a reasonable cause of action against the second defendant. D E F G

Held (overruling the preliminary objection): H

(1) The submission advanced for the second defendant revolved around both the plaintiffs' *locus standi* and cause of action against the second defendant. There existed a relationship between the plaintiffs and the second defendant, which was not just that they happened to purchase property from the same developer *ie*, the first defendant, but that the completion of each of their sale and purchase agreements was dependant I

on the developer completing the entire building. The plaintiffs and the second defendant shared the same interest in the building. The real effect of any execution proceedings against the first defendant, such as winding up, would surely extinguish both the plaintiffs' and the second defendant's right to obtain their respective apartments. The plaintiffs had, therefore, the right to protect their interest to the building. The Federal Court in *Tan Sri Haji Othman Saat v. Mohamed Ismail* held that an infringement of eg, a proprietary right which affects the plaintiff's interest substantially should suffice to constitute *locus standi*. In the circumstances, the plaintiffs clearly had a right over their share or part of the building which they had purchased and to see that specific interest protected. The question of whether there is a reasonable cause of action in a particular case is a question of mixed law and fact, to be determined by reference to the factual circumstances in each particular case. The plaintiffs' cause of action was averred in the affidavit in support seeking relief or remedy against the first and second defendants to preserve their interest in the property. That interest included the interest of all the purchasers, failing which, there would clearly be an infringement of the plaintiffs' proprietary right *ie*, to take delivery of vacant possession. The second defendant's preliminary objection sought to summarily strike out the originating summons. This was equivalent to striking out pleadings under O. 18 r. 19(1)(a) of the Rules of the High Court 1980, which must satisfy the test of proving that the plaintiffs' originating summons was obviously unsustainable. On the facts, the plaintiffs had a reasonable cause of action that was not obviously unsustainable, and must, therefore, be heard and determined on its merits. *Government of Malaysia v. Lim Kit Siang & Another Case* (foll); *Tan Sri Haji Othman Saat v. Mohamed Ismail* (foll). (paras 24, 25, 26, 27, 28, 29, 30, 31, 32 & 34)

Case(s) referred to:

Arab Malaysian Corp Builders Sdn Bhd & Anor v. ASM Development Sdn Bhd [1998] 2 CLJ Supp 169 HC ***(refd)***

Associated Newspaper's Group plc v. Insert Media Ltd and Others [1988] 2 All ER 420 HC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Government of Malaysia v. Lim Kit Siang; United Engineers (M) Berhad v. Lim Kit Siang [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(foll)***

Isyoda (M) Sdn Bhd v. Low Seong Tek [2000] 4 CLJ 621 HC ***(refd)***

Lee Eng Eow v. Mary Lee & Anor [1999] 3 CLJ 143 CA ***(refd)***
Letang v. Cooper [1964] 2 All ER 929 CA ***(refd)***
Lim Chong Construction Co Sdn Bhd v. Silam Quarry Sdn Bhd [1990] 1 CLJ 1158; [1990] 2 CLJ (Rep) 374 HC ***(refd)***
Saraswathy Devi Nadchatiram v. Vijayalakshmi Devi Nadchatiram [1998] 1 CLJ 1035 CA ***(refd)***
Siskina (Owners of Cargo Lately Laden On Board) And Others v. Distos Compania Naviera SA [1979] AC 210 ***(refd)***
Stamford Holdings Sdn Bhd v. Kerajaan Negeri Johor & Ors [1998] 1 CLJ 960 CA ***(refd)***
Tan Sri Hj Othman Saat v. Mohamed Ismail [1982] 1 LNS 2 FC ***(foll)***
Utusan Melayu (M) Bhd & Anor v. Chan Tse Yuen [1989] 1 CLJ 149; [1989] 1 CLJ (Rep) 163 SC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19(1)(a)

For the plaintiffs - Gideon Tan; M/s Gideon Tan Razali Zaini
For the 2nd defendant - Preetha Pillai; M/s Skrine

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Originating Summons

[1] The plaintiffs *vide* originating summons in encl. (1) are seeking *inter alia* an injunction to prevent the purchasers who are persons collectively named as the second defendants from executing any judgment that they have obtained for liquidated and ascertained damages (LAD) against the first defendant.

Factual Background

[2] The plaintiffs' affidavit in support reveals that the plaintiffs have entered into sale and purchase agreements with the first defendant ("the SPA") to purchase their respective A'Famosa Villa De Agua condominium units of which the developer is the first defendant.

[3] The terms and conditions of the SPA are, *inter alia*:

(1) Clause 22(1) – that vacant possession of the said condominium units to which water and electricity supply are ready for connection shall be handed over to the purchaser within 36 calendar months from the date of the SPA; and

A (2) Clause 22(2) – if the vendor (the first defendant) fails to hand over vacant possession of the said parcel, to which water and electricity supply is ready for connection in time, the vendor shall pay immediately to the purchasers liquidated damages to be calculated from day to day at the rate of ten per centum
B (10%) per annum of the purchase price.

[4] As at the date of filing this originating summons, delivery of vacant possession of the condominium units purchased by plaintiffs from the first defendant has yet been made. The first defendant
C has failed to hand over vacant possession thereof within the stipulated period of 36 months in the SPA.

[5] Second defendants' purchasers No. 263 to 273 had entered judgments for LAD against the first defendant on grounds of delay in delivering vacant possession thereof.
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[6] Other defendants have either filed and served their writ and statement of claim on the first defendant, or issued through their solicitors letters of demand claiming for, among others, liquidated damages for late delivery of vacant possession.
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[7] The defendants may, at any time before completion of delivery of vacant possession thereof, proceed to execute the judgments against the first defendant.

F **[8]** The plaintiffs are depending on the first defendant to complete the project and deliver vacant possession of the condominium units.

[9] The plaintiffs verily believe that if the defendants are to proceed with the execution of the judgments, in particular by way
G of presenting a winding up petition or proceeding with applications for writ of seizure and sale or garnishee order, against the first defendant, it may further delay or jeopardize the completion of the project.

H **[10]** Some of the plaintiffs have taken housing loans from end-financiers to enable them to purchase their respective condominium units and, as such, are liable to the respective end-financiers.

[11] If the second defendants still proceed to execute the judgments against the first defendant, the plaintiffs are still liable
I to their respective end-financiers despite the fact that the condominium units have yet to be completed.

[12] A group of purchasers (third parties) of the same condominium units have entered into a scheme of arrangement by way of a recovery package offered by the first defendant.

[13] The recovery package was offered by the first defendant to all purchasers of the condominium units, among others, to ensure that the project is completed without being burdened by claims for liquidated damages which will jeopardize the first defendant's cash flow which in turn, will jeopardize the completion of the project.

[14] The benefits, privileges or compensation offered under the recovery package is however subject to the purchasers agreeing to waive their right to claim for liquidated damages under the SPA and the purchasers' undertaking not to make a claim therefor.

[15] As such, execution of the judgments by the second defendants (in particular purchasers No. 263 to 272) against the first defendant may prejudice and affect the interest of the purchasers who have accepted the offer in the recovery package.

[16] This is due to the fact that the purchasers' claims under the SPA concerning liquidated damages has been waived when they accepted the recovery package from the first defendant.

[17] Should the second defendants proceed with execution of judgments against the first defendant, despite the plaintiffs' hope that the project will be completed without any further delay, it would cause tremendous losses to plaintiffs and the aforesaid third parties.

[18] The plaintiffs in this action do not intend to extinguish the rights of the second defendants but merely to suspend any proceedings against the first defendant, in particular, the winding up, so as to ensure delivery of the condominium units to all purchasers including the second defendants.

Reasonable Cause Of Action

[19] The second defendants, through learned counsel Miss Preetha Pillai, are raising a preliminary objection on the ground that the plaintiffs have no reasonable cause of action against the second defendants. Reference was made to:

(1) *Saraswathy Devi Nadchatiram v. Vijayalakshmi Devi Nadchatiram* [1998] 1 CLJ 1035 CA;

(2) *Lee Eng Eow v. Mary Lee & Anor* [1999] 3 CLJ 143 CA;

(3) *Associated Newspaper's Group plc v. Insert Media Ltd and others* [1988] 2 All ER 420 HC;

(4) *Government of Malaysia v. Lim Kit Siang; United Engineers (M) Berhad v. Lim Kit Siang* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC;

(5) *Utusan Melayu (M) Bhd & Anor v. Chan Tse Yuen* [1989] 1 CLJ 149; [1989] 1 CLJ (Rep) 163 SC;

(6) *Siskina (Owners of Cargo Lately Laden On Board) And Others v. Distos Compania Naviera SA* [1979] AC 210 HL;

(7) *Lim Chong Construction Co Sdn Bhd v. Silam Quarry Sdn Bhd* [1990] 1 CLJ 1158; [1990] 2 CLJ (Rep) 374 HC;

(8) *Arab Malaysian Corp Builders Sdn Bhd & Anor v. ASM Development Sdn Bhd* [1998] 2 CLJ Supp 169 HC; and

(9) *Isyoda (M) Sdn Bhd v. Low Seong Tek* [2000] 4 CLJ 621 HC.

[20] On the other hand, plaintiffs' learned counsel Mr. Gideon Tan contended that the relationship between the plaintiffs and the second defendants arose from their purchase of the condominium units and so the plaintiffs have a reasonable cause of action against the second defendants. He relied on:

(1) *Tan Sri Haji Othman Saat v. Mohamed bin Ismail* [1982] 1 LNS 2 FC; and

(2) *Letang v. Cooper* [1964] 2 All ER 929 CA.

[21] In my judgment, a good starting point is to set out the meaning of "a cause of action".

[22] In the then Supreme Court, Salleh Abas LP (as he then was) held in *Government of Malaysia, supra*, that a cause of action is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action. The learned Lord President also referred to *Letang, supra,* where Lord Diplock defined it to mean "a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person".

[23] Illustrations of factual situations which gave rise to no cause of action may be found where:

(1) an originating summons did not contain sufficient particulars so as to show what the plaintiff's cause of action was in respect of which the plaintiff was seeking relief or remedy: *Saraswathy Devi, supra; Lee Eng Eow, supra; Utusan Melayu (M) Bhd, supra; and Isyoda (M) Sdn Bhd;*

(2) the pleading merely characterized an act as unfair: *Associated Newspapers Group plc*, applying *Siskina, supra*;

(3) a Member of Parliament had no legal relationship with UEM, and was at the same time a complete stranger to the company: *Government of Malaysia; United Engineers (M) Berhad, supra;*

(4) the writ did not show an invasion of some legal or equitable right belonging to the plaintiff eg, the cargo owners had no legal or equitable right or interest in the insurance moneys payable to shipowners in respect of the loss of the vessel: *Siskina, supra;*

(5) the indorsement on the writ does not disclose any reasonable cause of action: *Lim Chong Construction Co Sdn Bhd, supra;* and

(6) there is only a claim of a right to arbitration which has not yet been formulated or there was a mere intention to arbitrate: *Arab Malaysian Corp Builders Sdn Bhd & Anor, supra.*

[24] I am of the view that the submission advanced for the second defendants revolves around both the plaintiffs' *locus standi* and cause of action against the second defendants. In this regard, *Tan Sri Haji Othman Saat, supra,* is relevant. There, the respondent and 183 other persons had applied in May 1972 for State land in Mersing, Johor but with no response for some eight years. It then came to his knowledge, and this is borne out by an official search, that some time in 1976, land in that area had in fact been alienated to more than 100 people, the majority of whom were not resident in Mersing, including the appellant who at the material time was the Johor Menteri Besar, and personages in the upper echelon of the administration, such as members of the State Executive Council and Ministers. In determining whether the respondent has locus, the Federal Court speaking through Abdoolcader J (later SCJ) held that it was a clear case of a person ie the respondent having a special or substantial interest in the

A subject matter of the proceedings he had instituted and whose legal interests were particularly affected, thereby clearly giving him capacity to sue.

[25] Reverting to the mainstream of the above factual
B background, it is to be noted that there existed the relationship between the plaintiffs and the second defendants. This relationship is not just that they happened to purchase property from the same developer ie the first defendant.

[26] The relationship between the plaintiffs and the second
C defendants is that the completion of each of their SPA is dependant on the developer completing the entire building. The plaintiffs and the second defendants share the same interest in the building.

D **[27]** The real effect of any execution proceedings against the first defendant such as winding up will surely extinguish both the plaintiffs' and the second defendants' right to obtain their respective apartments. The plaintiffs have therefore the right to protect their interest to the building.

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[28] At p 179F-G right column, the Federal Court in *Tan Sri Haji Othman Saat, supra,* held that an infringement of eg a proprietary right which affects the plaintiffs interest substantially should suffice to constitute *locus standi.*

F

[29] In the circumstances, the plaintiffs clearly have a right over their share or part of the building, which they have purchased and to see that specific interest protected.

[30] The question of whether there is a reasonable cause of
G action in a particular case is a question of mixed law and fact, to be determined by reference to the factual circumstances in each particular case.

[31] The plaintiffs' cause of action is averred in the affidavit in
H support seeking relief or remedy against the first defendant and the second defendants to preserve their interest in the property. That interest includes the interest of all the purchasers, failing which, there would clearly be an infringement of the plaintiffs' proprietary right ie, to take delivery of vacant possession.

I

[32] The second defendants' preliminary objection seeks to summarily strike out the originating summons. This is equivalent to striking out pleadings, under O. 18 r. 19(1)(a) which must satisfy

the test of proving that the plaintiffs' originating summons is obviously unsustainable. The principles governing an application under O. 18 r. 19(1)(a) are trite. The *locus classicus* is to be found in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 SC where the then Supreme Court speaking through Mohamed Dzaiddin SCJ (later CJ Malaysia) set out the principles in essence as follows:

(1) It is only in plain and obvious cases that recourse should be had to the summary process under this rule and summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it "obviously unsustainable"; and

(2) So long as the pleading disclosed some cause of action or raised some question fit to be decided by the judge, the mere fact that the case was weak and not likely to succeed at the trial was no ground for the pleading to be struck out.

[33] In *Stamford Holdings Sdn Bhd v. Kerajaan Negeri Johor & Ors* [1998] 1 CLJ 960 CA, Ahmad Fairuz JCA (now CJ Malaysia) delivered judgment for the Court of Appeal and held *inter alia* as follows:

(1) So long as the statement of claim discloses some cause of action, the mere fact that the plaintiff is not likely to succeed on it at the trial is no ground for it to be struck out; and

(2) The court would assume the contents of the statement of claim to be true in the absence of defence being filed by the respondent.

Conclusion

[34] On the foregoing grounds, I am of the view that the plaintiffs have a reasonable cause of action which is not obviously unsustainable. I therefore overrule the preliminary objection. Plaintiffs' reasonable cause of action must therefore be heard and determined on its merits. At this stage of preliminary objection, I shall refrain from expressing my views thereon.

[35] It is to be observed that the plaintiffs have not asked for costs at this stage of preliminary objection. That being the case, the proper order should be costs in the cause, which I hereby order.